I HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY OF THE ORIGINAL THEREOF.

Attorney for Respondents

Supreme Court, U.S.
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NO. 82-332

IN THE

Supreme Court of the United States

October Term, 1982

MAS FUJIMOTO, DELMER EISERT, ROBERT GUY and AGNES GUY,
Petitioners,

v.

CITY OF HAPPY VALLEY, et al,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether petitioners' "taking" claim is moot given respondent city's enactment in August, 1980 of an entirely new comprehensive plan and zoning ordinance which: (a) increases the permissible residential density on petitioners' properties beyond the density permitted at any time since petitioners acquired their properties; and (b) commits the city to extend sewer and other municipal services to petitioners' properties on a "timely, orderly and efficient" basis?
2. Whether a Federal question is presented by petitioners' claim that the city had an affirmative duty to increase the value of petitioners' land by: (a) providing higher density zoning; or (b) extending sewer and other municipal services?
3. Did the District Court correctly abstain from deciding this case where any federal claims may have been mooted by a statewide land use planning process in which respondent city is engaged, and where a federal court decision would be disruptive to state efforts to establish coherent land use policy for the Portland metropolitan area?

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EXHIBIT A

City of Happy Valley Comprehensive Plan, August 1980 ..... One Copy lodged with Office of the Clerk, U.S. Supreme Court

EXHIBIT B

City of Happy Valley, Oregon Land Development Ordinance No. 72 August, 1980 ..... One Copy lodged with Office of the Clerk, U.S. Supreme Court

NO. 82-332

IN THE

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October Term, 1982

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OPINIONS BELOW

The opinions of the District Court and Court of Appeals are unreported, and appear in Appendix B and Appendix C of the Petition, respectively.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition at p.2.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Just Compensation Clause of the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment, and 42 U.S.C. §1983 (1976) are set forth in the Petition at pp. 2-3.

STATEMENT OF THE CASE

This cause was decided on motion for summary judgment, so the allegations of the complaint, as supplemented by petitioners' affidavits in opposition to the motion, must be accepted as true.

Petitioners' Claim

Happy Valley, a suburb on the eastern edge of the Portland metropolitan area near the foothills of the Cascade mountain range, was incorporated in 1965. Its purpose for incorporating was to insulate itself from development pressures emanating from Portland or from annexation by Portland.

Each petitioner has, since 1970, owned undeveloped, unserviced property in Happy Valley. At all times prior to 1980, all non-commercial land in Happy Valley was zoned R/20. The minimum lot size in the R/20 zone was 20 thousand square feet, or roughly two dwellings per acre, maximum. The R/20 zone did not contemplate development, city-wide, at half-acre densities. Rather, lot sizes were to be calculated on a lot-by-lot basis, the size of lots depending upon the area required for septic tank drainfields. The 1973 Happy Valley Comprehensive Plan stated that it was the policy of the city to use septic tanks instead of sewers, and that the lot size policies "* * * will reduce the incidents of disposal field breakout and the possible resultant health problems." (1973 Comprehensive Plan, p. 6). Clackamas County, not respondents, determines drainfield requirements and, according to petitioners, the county "requires a minimum of two acres for individual disposal systems in soils exhibiting the characteristics of these soils." Petition, p. E-7.

Petitioners' properties allegedly could not be developed at economic residential densities because their soils require larger areas for septic tanks. Petitioners claim that, again because of poor soils, their properties cannot be put to economic agricultural or forest use.

Petitioners allege that various actions and decisions of respondents prior to filing of the complaint in May, 1978 prevented petitioners from developing their properties at economic residential densities and constituted a "taking" of their properties. The gravaman of the complaint is that respondents' decisions and actions, taken as a whole, prevented sewers from being extended in the city or to petitioners' properties. Without sewers, the complaint alleges, petitioners' lands cannot economically be developed residentially and have no other value.

Respondents moved for:

—dismissal or summary judgment on the grounds of either abstention or ripeness, pending the outcome of the statewide planning process;

—a stay of the proceeding pending determination of all state law issues in the state courts;

—dismissal or partial summary judgment on petitioners' inverse condemnation claim for failure to state a cause of action;

—dismissal for failure to join necessary parties, the Land Conservation and Development Commission and Metropolitan Service District.

Without reaching the other issues, the federal magistrate recommended, and the District Court decided, to abstain pending resolution of the state law questions in the state agencies and courts. On appeal by petitioners, the United States Court of Appeals for the Ninth Circuit dismissed the complaint for failure to state a claim.

History of State and City Land Use Process

In 1973 Happy Valley adopted a comprehensive plan for all city lands, including petitioners.' Later that same year, the Oregon legislature enacted Or. Rev. Stat. Ch. 197, which required all cities and counties in the state to enact new comprehensive plans and zoning ordinances. The new plans and ordinances are required to conform to statewide planning standards or "goals" which were enacted by a new state agency, the Land Conservation and Development Commission ("LCDC"), in 1975. *See* Or. Admin. Rules Ch. 660 (Appendix). The plans and ordinances of the cities

and counties in the Portland metropolitan area were also required to conform to requirements of a regional planning agency now known as the Metropolitan Service District ("MSD"), formerly known as the Columbia Region Association of Governments ("CRAG").

The petition correctly states (at pp. 8-9), that in August 1980, respondents adopted an entirely new comprehensive plan and zoning ordinance for Happy Valley. The city's new plan and ordinance increased residential densities city-wide. Specifically, petitioners' lands were reclassified as follows (*See* Appendix A, below, and Exhibit A at pp. 50-52):

Petitioner	Total Acreage	Number of Dwellings Permitted	Dwelling Units Per Acre (Net)
Fujimoto	72	204	2.83
Guy	30	55	1.83
Eisert	43	126	2.93

Unlike the prior city plan and ordinances, the new plan and ordinances permit "clustering" of housing to achieve these densities, and commit to extend all necessary municipal services, including sewer, on a "timely, orderly and efficient" basis.

Rather than develop their properties under the 1980 plan and ordinances as they could, petitioners elected to contest the 1980 plan at LCDC claiming that the plan did not permit housing at densities sufficient to satisfy LCDC's housing standards and advocated higher densities, six dwellings per acre. The state law dispute over the city's housing obligations is now pending in the Oregon Court of Appeals (Case Nos. CA A-25552 and CA A-24967).

REASONS FOR DENYING THE WRIT

1. This cause has become moot.

Petitioners' complaint was filed in 1978. In August 1980, Happy Valley adopted a new comprehensive plan. Under the plan, petitioners may develop their properties at overall residential densities ranging from 1.83 to 2.93 dwelling units per acre. The plan contains commitments by the city to extend such public facilities and services, including sewer and water, as are necessary to achieve these densities on a "timely, orderly and efficient" basis. (*Id.* at 67-69). The new comprehensive plan and zoning ordinance permit clustering and planned unit developments to achieve the stated housing densities. (*Id.* at 42-43).

The comprehensive plan is "* * * the controlling land use planning instrument for a city." *Baker v. City of Milwaukie*, 271 Or.

500, 514, 533 P.2d 772 (1975). It is a legislative act which is "* * * permanent in nature." *Id.* Having adopted the plan, Happy Valley is now obligated to effectuate the plan by adopting zoning ordinances and making land use decisions in accordance with it. *Id.* at 510, 514.

Petitioners have not applied to the city, as they could, for approval to develop their properties to the densities permitted in the 1980 plan, even though these densities are generally greater than those allowed by the city's zoning ordinances at the time petitioners acquired their properties. *See Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). Rather, petitioners have elected to await the outcome of pending state court litigation which may increase their densities even further, to six dwelling units per acre.

There is no case or controversy to be determined by the Court because the comprehensive plan now in effect changed all relevant city policies and established new, more valuable uses for petitioners' lands. This Court reviews the issue of mootness by considering a statute as it exists at the time of the review and not as it existed when the case was commenced. *Hall v. Beales*, 396 U.S. 45, 48 (1969).

The comprehensive plan is similar to an administrative rule. In those cases where rules have changed or new data is available at the time the matter is being considered by the federal courts, the cases will be remanded for dismissal because of mootness. In *Wilderness Public Rights Fund v. Kleppe*, 608 F.2d 1250 (9th Cir. 1979), *cert. denied, Wilderness Public Rights Fund v. Andros*, 446 U.S. 982 (1980), appellants challenged the method used by the National Park Service in determining an allocation for the use of the Colorado River based on 1972 data. A new study was completed during the pendency of the litigation which changed the allocation and made the challenge to the earlier interim management allocation plan moot. In *Tennessee Gas Pipeline Co. v. Federal Power Commission*, 606 F.2d 1373 (D.C. Cir. 1979), *cert. denied*, 445 U.S. 920 (1980), the gas pipeline company challenged two orders of the Federal Power Commission declaring the company's curtailment of natural gas deliveries unjust and preferential. The challenge was declared moot because, while it was pending, the company ended its curtailment program.

In this case, petitioners may, under the 1980 comprehensive plan, develop their properties at densities greater than those allowed at the time their complaint was filed in 1978. Petitioners are challenging decisions and policies that no longer exist and no longer affect the

development of their properties. It is the existing law and not that in effect at the beginning of the action which must be considered. Petitioners' claim is now moot.

2. There Has Been No Taking, Temporary or Permanent.

The Just Compensation clause states: "[N]or shall private property be taken for public use, without just compensation." A threshold question in any "regulatory taking" case is whether property which at some point in time had economic value is rendered worthless by government action. Government has no constitutional duty to make worthless land valuable. Its duty, absent a legitimate state interest, is not to make valuable property worthless. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 122-29 (1978), and cases cited.

Petitioners' complaint and affidavits state that because of poor soils, petitioners' land cannot profitably be farmed or forested, and needs sewers to be developed economically for houses. Stated differently, petitioners complain that because of the natural characteristics of the soils, their properties are worthless unless the city facilitates high density housing development by extending sanitary sewers.

> "Until this property is provided with public sewers and a density of development is allowed which makes installation of those sewers economically feasible, this property has no economic use." Petition, p. E-11. *See also* Petition, p. E-9.

Reduced to essentials, petitioners' complaint is that the city had a constitutional duty to sewer their properties and thereby make them economically useful for housing development, since the land was otherwise worthless because of its poor soils.

This is not a case in which property rights or land uses are alleged to have been diminished by government regulation. In every regulatory taking case, there is at least an allegation that government regulation has diminished the value of property. For example, in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), plaintiff's property was downzoned to an "open space" classification after it was purchased. In *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981), land which, when acquired, was zoned "industrial" was subsequently downzoned to "agricultural" and "open space." In *Village of Euclid v. Ambler Realty*, 272 U.S. 365 (1926), the initial imposition of zoning diminished plaintiff's

property value by seventy-five percent.

In this case, petitioners' properties were at all times prior to 1980 zoned R/20, a zone in which lots larger than 20 thousand square feet were permitted. Happy Valley did not downzone petitioners' lands. Nor did respondents take sewers from petitioners. Petitioners, as all Happy Valley landowners, never had sewers. Petitioners' complaint is not that the city changed the rules, it is that it should have.

Happy Valley was incorporated in 1965 to maintain low residential densities and a semi-rural environment. This was a perfectly legitimate state purpose, *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 129 (1978), " . . . clearly within the reach of the police power." 1 R. Anderson, American Law of Zoning, §7.06 at 545 (2d Ed. 1976). The city was not constitutionally required to change its land use policies and regulations at the expense of this purpose to make petitioners' real estate investments profitable.

Petitioners do not complain that their property had fewer uses the day the complaint was filed than when they bought it. If the allegations of the complaint are true, because of its poor soil the land never had any value. Baldly stated, petitioners complain their property was "taken" because the city did not *give* them economic land uses they never had. A constitutional prohibition on "takings" is one thing. A constitutional duty to give is quite another.

This is a case where land speculators invested in unserviced, undeveloped land on the urban fringe expecting development pressures and urbanization to come their way faster than it has. The United States Constitution does not guarantee them a profit.

3. Uncertainties in property rights which may have arisen during the Oregon statewide land use planning process are not compensible.

Petitioners allege there has been a "temporary taking" in this case. Respondents are uncertain what petitioners' argument is. If petitioners are alleging that the city's planning process, which consumed a number of years, created uncertainties as to the petitioners' property rights and a "taking," petitioners have failed to state a claim.

Happy Valley was incorporated in 1965 to protect itself against external development pressures and to preserve its low density, semi-rural character. In 1973, Oregon enacted a unique, ambitious, statewide land use planning law, Or. Rev. Stat. Ch. 197, and two

years later the new state land use planning agency, LCDC, enacted the planning standards or "goals." The law requires all cities and counties in the state to prepare and adopt entirely new comprehensive plans and zoning ordinances, and to submit them to LCDC for an approval known as "acknowledgment of compliance with the goals."

For many years after the enactment of Or. Rev. Stat. Ch. 197, there was considerable uncertainty about the legal effect of the new laws and standards on pre-existing local comprehensive plans and zoning ordinances, and confusion about the meaning and requirements of the statewide goals. Specifically, it was unclear whether the new laws and requirements would enable Happy Valley to continue to implement the purpose for its municipal existence, or whether Happy Valley would have to extend municipal services to facilitate higher density development.

Until it commenced work on its 1980 comprehensive plan, Happy Valley resisted land use designations and public facility and service commitments that would necessitate high density growth. For example, as petitioners complain, the city resisted and argued against inclusion of its land within the Portland metropolitan area urban growth boundary, that is, an "urban" designation, and annexation of city lands to a county sewer service district. The city's reason for doing so, to prevent overcrowding of land and undue concentration of population, was a "legitimate state interest," *Agins v. City of Tiburon*, 447 U.S. at 261, "* * * clearly within the reach of the police power." 1 R. Anderson, American Law of Zoning § 7.06 at 545 (2d Ed. 1976).

Beginning in 1978, one month before the filing of the complaint in this case, state land use policy began to develop in a way pertinent to Happy Valley. In April of that year, LCDC interpreted its Housing Goal, Goal 10, to require each city in the Portland metropolitan area to provide a portion of the regional housing stock necessary to accommodate projected year-2000 regional population growth. *Seaman v. City of Durham*, 1 LCDC 283 (1978). Thereafter, the LCDC upheld a decision of the Portland regional planning agency, the Metropolitan Service District, to include Happy Valley in the metropolitan urban growth boundary. *See Fujimoto v. Metropolitan Service District*, 2 LCDC 295 (1979).

Pursuant to these directives, in 1980 Happy Valley adopted its new comprehensive plan which increased housing densities city-wide, and commits the city to extend such public facilities and

services as may be needed to develop at those densities. Petitioners have challenged this plan maintaining, among other things, that the housing densities are still not high enough to satisfy state housing policy. This controversy as to state housing policy is now pending in the Oregon Court of Appeals (Case Nos. CA A-25552 and CA A-24967).

Petitioners contend that a temporary diminution in their property values arising from respondents' land use decisions is compensible. Even assuming that the decisions and acts complained of in this case temporarily diminished the value of petitioners' property, those decisions and actions were incidental to and concurrent with a statewide land use planning process in which Happy Valley, the Metropolitan Service District, and the LCDC were and are engaged. That decisionmaking process is, for Happy Valley, in its final stages, and has already benefitted petitioners. Depending on the outcome of the pending state court of appeals cases, petitioners could be benefitted even further.

In *Agins v. City of Tiburon*, 447 U.S. 255, (1980), the city downzoned plaintiffs' property to an "open space" classification (one dwelling per five acres), and shortly thereafter instituted eminent domain proceedings against the land. A year after the eminent domain proceedings were instituted, they were abandoned. Plaintiffs contended, first, that the downzoning constituted a "taking"; second, that the city's aborted attempt to condemn the land had destroyed its value during the pendency of the eminent domain proceedings. This Court rejected both claims stating, with respect to the second:

> "Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are 'incidents of ownership.' They cannot be considered as a 'taking' in the constitutional sense'." 447 U.S. at 263, n.9.

In this case the governmental decisionmaking complained of has been incidental to a highly technical joint local-regional-state agency land use planning process. It has been time consuming and is not yet complete. Of Oregon's roughly 278 cities and counties, as of October 2, 1982, only 154 had completed the process. (Source: Oregon Department of Land Conservation and Development). Four counties and fifteen cities had not completed comprehensive plans or submitted them to LCDC for approval. The plans of sixteen counties and fifty-seven cities, including Happy Valley were

disapproved by LCDC and had not been returned with modifications for another review. *Id.*

The time it has taken Happy Valley, given the legal and technical complexity of the process, has been neither unusual nor extraordinary. If this Court were to hold, as petitioners suggest, that uncertainties associated with the Happy Valley—statewide planning process have given rise to a "temporary taking" claim, the same would doubtless be true with respect to some if not all the other roughly 124 cities and counties whose plans and ordinances are not yet complete or acknowledged. This result could cripple or destroy a land use system Oregon has spent nearly ten years and over twenty million dollars to implement, and which is now nearing completion. Indeed, petitioners' $2.2 million prayer is roughly ten percent of the state's ten-year planning budget.

Even if the governmental decision making in this case caused a temporary loss in the value of petitioners' property or a temporary reduction in their ability to sell or develop, such temporary loss does not constitute inverse condemnation or a "taking."

4. The District Court correctly abstained from deciding this case.

Petitioners request an adjudication that there has been a Fifth Amendment "taking" of their property. In order to determine this question, the federal courts must look to state law to determine what property rights, if any, exist with respect to the property. To the extent that petitioners' property rights were not fixed by the 1973 and 1980 Happy Valley comprehensive plans, they are now being established through the Or. Rev. Stat. Ch. 197 statewide planning process and litigation associated therewith, and will be fixed once that process has been concluded.

While "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule," *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813 (1976), federal abstention is appropriate:

> (a) in cases involving a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of state law, *Id.* at 814; *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, (1941); *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959);
>
> (b) in cases presenting difficult questions of state law involving policy problems "of substantial public import" or

where a federal court determination "would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Colorado River,* 424 U.S. at 814; *Burford v. Sun Oil Company,* 319 U.S. 315 (1943); *Louisiana Power,* 360 U.S. 25 (1959).

The Happy Valley planning process clearly involves policy problems of substantial state import. These issues are at least as "intimately involved with sovereign prerogative" as the eminent domain power challenged in *Louisiana Power,* 360 U.S. at 28. A resolution of these issues in federal court would be disruptive to the efforts of the State of Oregon to "establish a coherent policy with respect to a matter of substantial public concern." *Colorado River,* 424 U.S. at 814. *See* Or. Rev. Stat. §197.010:

> "**Policy**. The Legislative Assembly declares that, in order to assure the highest possible level of liveability in Oregon, it is necessary to provide for properly prepared and *coordinated comprehensive plans* for cities and counties, regional areas and the state as a whole. These comprehensive plans:
>
> * * *
>
> "(4) Shall be prepared to assure that *all public actions are consistent and coordinated with the policies expressed through the comprehensive plans.*" (Emphasis supplied).

In the present case, the District Court correctly noted that abstention is appropriate when:

> "(1) The Complaint touches upon a sensitive area of social policy upon which federal courts ought not to enter unless no alternative to its adjudication is open;
>
> "(2) Such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy; and
>
> "(3) The possibly determinative issue of state law is doubtful." Petition for Certiorari, p. B-2.

The District Court relied upon *Canton v. Spokane School District No. 81,* 498 F.2d 840, 845 (9th Cir. 1974). *See also Isthmus Landowners Association, Inc. v. State of California,* 601 F.2d 1087 (9th Cir.1979); *Newport Investments, Inc. v. City of Laguna Beach,* 564 F.2d 893 (9th Cir. 1977); *Sea Ranch Association v. California Coastal Zone Conservation Commission,* 537 F.2d 1058 (9th Cir. 1976); *Rancho Palos Verdes Corp. v. City of Laguna Beach,* 547 F.2d 1092 (9th Cir. 1976). For the reasons stated by the District Court, these criteria are satisfied in this case.

Petitioners incorrectly cite three cases in an effort to show a conflict among the circuits whether *Pullman* or *Burford* abstention is appropriate in a case such as this: *Hernandez v. City of Lafayette*, 643 F.2d 1188 (5th Cir. 1981), *cert denied*, 102 S.Ct. 1251 (1982); *Nasser v. City of Homewood*, 671 F.2d 432 (11th Cir. 1982); *Heritage Farms Inc. v. Solebury Township*, 671 F.2d 743 (3rd Cir. 1982). In *Hernandez*, abstention does not appear to have been argued, and was not discussed. In *Nasser*, abstention was not applied because the issues of state law were not "uncertain or ambiguous"; and there was no likelihood that resolution of state law questions would "moot or present the federal questions in a different posture." 671 F.2d at 439. In *Heritage Farms*, plaintiff alleged that defendants' zoning decision was motivated by an attempt to prevent competition with defendants' own nearby businesses, and that defendants made false statements to financial institutions to prevent plaintiffs from securing loans. The court correctly stated that abstention is warranted when state land use policies may be threatened by a federal court decision, but held that abstention was inappropriate in the presence of allegations of fraudulent activity for personal gain, "corruption" and "defamation." Thus in one case, abstention was not discussed; in two the criteria for abstention applied by the District Court in this case were found inapplicable. Each of these cases is distinguishable from the present case. There is no conflict among the Circuit Courts.

In this case, the state regulatory agency, LCDC, the regional planning agency, the Metropolitan Service District, Happy Valley, and the state courts have been and are currently resolving the rights of petitioners respecting the development of their land. The process now underway in the state could enable petitioners to develop their land in any manner they wish and render this case moot, if it has not done so already. Any decision by a federal court prior to the conclusion of this process would be premature and disruptive to the effective functioning of the state land use planning process. *See Webber v. Skoko*, 432 F. Supp. 810 (D. Or. 1977). The District Court's order of abstention was proper in this case.

5. Alternative Reasons for Denying the Writ.

Assuming, arguendo, that this Court holds that this case is not moot, that the District Court erred in abstaining, or that the Court of Appeals erred in dismissing the case, the case should be partially or totally dismissed on the alternative grounds cited in respondents' original motion for summary judgment. These grounds are:

(a) The case is not ripe;

(b) The plaintiffs have failed to join necessary parties the LCDC and Metropolitan Service District; and

(c) Plaintiffs have failed to state a claim for inverse condemnation.

These grounds were fully argued in respondents' brief to the Court of Appeals (Appellees' Brief at pp. 14-24), and in the motion for summary judgment (Excerpt of Record in Court of Appeals at pp. 192-202; 219-236). Those arguments will not be repeated here. Even if there were a substantial constitutional question in this case, it would not be in a fit posture for decision by this Court.

CONCLUSION

For these reasons, the writ of certiorari should not issue.

Respectfully submitted,

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APPENDIX A

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November 2, 1982

Mr. Frank Josselson
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Subject: Eisert-Guy-Fujimoto properties within the City of Happy Valley

Dear Mr. Josselson:

As the land use planning consultants to the City of Happy Valley, we have been asked to review the above-mentioned properties in the context of the development potential under the adopted Happy Valley Comprehensive Plan. In addition to the Eisert-Guy-Fujimoto properties, we have reviewed the immediately surrounding properties. The limits of our review are illustrated on the accompanying map, marked Exhibit 1.

It is our determination based on the elements of the Happy Valley Comprehensive Plan, especially Exhibit 10-Land Use Plan, that the subject properties have been designated for the following residential land uses:

Guy	6 dwelling units per acre on approximately 3.5 acres 2 dwelling units per acre on approximately 16 acres 1 dwelling unit per five (5) acres on approximately 10 acres
Eisert	4 dwelling units per acre on approximately 20 acres 2 dwelling units per acre on approximately 23 acres
Fujimoto	4 dwelling units per acre on approximately 25 acres 2 dwelling units per acre on approximately 52 acres

Based on the above density determinations, the total units for the properties are:

Guy: 55 units
Eisert: 126 units
Fujimoto: 204 units

The residential density designations within the city of Happy Valley have been established for all lands within the city, based largely on the natural physical characteristics. Such factors as steep slopes, soils, geology, and drainage channels inhibit development potential. As a result, the residential land use designations permit low to moderate residential densities. Only the most suitable areas of the city have been designated for the maximum development potential of six (6) units per acre. Much of the city is designated for two (2) and four (4) units per acre, with smaller areas designated one (1) unit per acre. Those areas exhibiting the poorest physical qualities have been designated for one (1) dwelling unit for every five (5) acres.

A review of the city's adopted Comprehensive Land Use Plan Map reveals that the Guy property is surrounded on two sides by lands designated one (1) unit per acre and six (6) units per acre. The remaining sides are abutted by lands under the jurisdiction of Clackamas County because the site is located in the very northwesterly corner of the city. The Eisert property is surrounded by lands designated one (1) unit for every five (5) acres on the east, two (2) units per acre and four (4) units per acre on the south, one (1) unit for every five (5) acres and two (2) units per acre on the west, one (1) unit per acre and two (2) units per acre on the north. The Fujimoto property is bordered by lands designated two (2) units per acre and four (4) units per acre on the east, two (2) units per acre and four (4) units per acre on the south, four (4) units per acre on the west, and two (2) units per acre on the north. Please see Exhibit 1 for specific land use designations.

We believe this letter fulfills your request for information on this matter. If you require additional information, please call at your convenience.

Yours sincerely,

Al Benkendorf AICP

AB:rp/cc
Enclosure: Map

EXHIBIT 1

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of November, 1982, three copies of this Brief in Opposition to Petition for Writ of Certiorari were mailed, postage prepaid, to Terry D. Morgan, Esq., Morgan & Shonkwiler, P.C. 205 Metro Housing Center Bldg., 15555 S.W. Bangy Road, Lake Oswego, OR 97034, Counsel for Petitioners. I further certify that all parties required to be served have been served.

WOLF, GRIFFITH, BITTNER,
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